COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION
One Ashburton Place: Room 503
Boston, MA 02108
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DONNA M. McNAMARA,
Appellant

v.

HUMAN RESOURCES DIVISION,
Respondent

B2-13-289

Appearance for Appellant:

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Appearance for Respondent:

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Commissioner:

Christopher C. Bowman

DECISION ON CROSS MOTIONS FOR SUMMARY DECISION

Procedural History of the Instant Appeal

On December 28, 2013, the Appellant, Donna McNamara (Sgt. McNamara), a police sergeant in the Town of Stoughton (Town), pursuant to G.L. c. 31, § 2(b), filed an appeal with the Civil Service Commission (Commission), contesting the decision of the state's Human Resources Division (HRD) that she was ineligible to take the promotional examination for the position of police lieutenant on October 19, 2013. I held a pre-hearing conference on February 4, 2014, which was attended by Sgt. McNamara, her counsel and counsel for HRD. The parties subsequently filed cross Motions for Summary Decision.

Question Presented

HRD is responsible for conducting civil service examinations, for purposes of establishing eligible lists. G.L. c. 31, § 5(e). G.L. c. 31, § 59 establishes the criteria upon which HRD relies to determine whether an individual is eligible to sit for a promotional examination for public safety positions. The question here is whether HRD erred in its interpretation of Section 59 when it denied Sgt. McNamara the opportunity to sit for a promotional examination for police lieutenant. This is not a new issue for the Commission – or the Court.

Applicable Civil Service Law

The fundamental purpose of the civil service system is to guard against political considerations, favoritism, and bias in governmental hiring and promotion. The commission is charged with ensuring that the system operates on "[b]asic merit principles." Massachusetts Assn. of Minority Law Enforcement Officers v. Abban, 434 Mass. at 259, citing Cambridge v. Civil Serv. Comm'n., 43 Mass.App.Ct. at 304. "Basic merit principles" means, among other things, "assuring fair treatment of all applicants and employees in all aspects of personnel administration" and protecting employees from "arbitrary and capricious actions." G.L. c. 31, § 1. Personnel decisions that are marked by political influences or objectives unrelated to merit standards or neutrally applied public policy represent appropriate occasions for the Civil Service Commission to act. Cambridge at 304.

G.L. c. 31, § 59 provides in pertinent part,

> "An examination for a promotional appointment to any title in a police or fire force shall be open only to permanent employees in the next lower title in such force . . . provided, however, that no such examination shall be open to any person who has not been employed in such force for at least one year after certification in the lower title or titles to which the examination is open." (emphasis added)

History of Prior Commission and Court Decisions

Pre-Weinburgh

For many years, HRD – and the Commission - interpreted Section 59 as requiring a candidate to have been employed *in the next lower title* for at least one year before being eligible to sit for a promotional examination in the next higher title. For example, a candidate for police lieutenant, under HRD's prior interpretation, must have been employed *as a police sergeant* for at least one year in order to sit for a police lieutenant promotional examination.

Ruling on a challenge brought by Haverhill Fire Lieutenant Paul Weinburgh, who HRD and the Commission determined to be ineligible to sit for a Fire Captain's promotional examination, the Court concluded that this was an incorrect reading of the statute. In Weinburgh v. Haverhill and Civ. Serv. Comm'n, Suffolk Superior Court No. 2006-3187-D (2007), the Court stated in relevant part:

> " … in my view, the legislature chose to separate the requirement of employment in the force (no rank) from that of a year's certification in the lower rank. At the very least, this wording indicates that an administrative landmark, rather than a factual one, should be used to determine eligibility to sit for a civil service exam.
>
> Moreover, the statute uses the term 'certification' rather than language closer to the Commission's interpretation, such as 'promotion' or 'having served". This is of particular significance as 'Certification' is a term of art with respect to Chapter 31. G.L. c. 31, § 1 states: "Certification is the designation to an appointing authority by the administrator of sufficient names *from an eligible list* or register *for consideration of the applicants' qualifications* for appointment pursuant to the personnel administration rules." Reviewing the plain language of the whole statute, I read Section 59 to only require that candidate have been placed on the *promotion list* for the immediate lower position a year prior, not that he have been actually promoted to it. As the Administrative Record establishes, Weinburgh was on the promotion list for Fire [] Lieutenant in the Summer of 2003, more than fifteen months prior to the date of the Captain's exam … (emphasis added) (*emphasis in original*)
>
> In affirming the Superior Court's decision, the Appeals Court stated in relevant part:

> " … the judge correctly concluded that G. L. c. 31, § 59, requires that an employee: (1) be on the promotion list (and, thus, certified) for the immediate lower position one year prior to taking the exam for the higher position; and (2) actually serve in the force for one year after certification, but not necessarily in that lower position. In this case, because the plaintiff was certified for the lower position of fire lieutenant in the summer of 2003 and had been employed "in such force," see G. L. c. 31, § 59, for one year after certification, he was qualified to sit for the fire captain's examination in November, 2004." (emphasis added)
> Weinburgh v. Civil Service Commission & City of Haverhill, 72 Mass. App. Ct. 535, 538 (2008).

Post-Weinburgh

Following the Court's decisions in Weinburgh, HRD modified its criteria regarding who was eligible to sit for a public safety promotional examination. At the time, HRD concluded that, in accordance with Section 59 and the Appeals Court decision in Weinburgh, eligibility for promotional examinations should be calculated by adding the time an applicant's name appears on the certification from which he was appointed to the qualifying title and the time spent in the qualifying title.

Five (5) individuals challenged HRD's "Post-Weinburgh" interpretation of Section 59 by filing appeals with the Commission. In a series of 26-page decisions[1], the Commission agreed with the Appellants, stating in relevant part:

> "In summary, HRD has misapplied the Weinburgh decision and, in doing so, is ignoring the plain language of Section 59 by adding words that do not exist. Based on the plain reading of Section 59 and the Weinburgh decision, HRD must calculate an individual's eligibility to sit for a promotional examination as follows. First, is the individual serving in the next lower title as of the date of the examination? If so, has the individual served in the force for at least one year[2] since his name was first certified for that lower qualifying title, regardless of whether that certification resulted in his appointment to the lower qualifying title. It is irrelevant how long an individual's name appeared on any individual certification."

[1] Hallissey and Dickinson v. HRD, 24 MCSR 200 (2011); Martucci and Toledo v. HRD, 24 MCSR 215 (2011); and Jordan v. HRD, 24 MCSR 208 (2011).
[2] A longer duration of time is required in cities and town with a population grater than 50,000.

HRD subsequently modified its Section 59 criteria accordingly and has applied the above-referenced criteria from the Commission's Post-Weinburgh decisions since 2011.

Facts Related to Instant Appeal

1. On October 15, 2011, HRD administered an examination for promotional appointment to the position of police sergeant.
2. On March 31, 2012, HRD established the eligible list resulting from the October 15, 2011 sergeant examination.
3. By electronic mail dated April 5, 2012, HRD sent the Town of Stoughton the entire eligible list for sergeant, which would expire on March 31, 2014.
4. The April 5, 2012 email from HRD to the Town informed the Town of its responsibility, pursuant to certification delegation guidelines effective September 1, 2009, of its responsibility "to properly generate certifications from the eligible list and to document the promotional selection process."
5. On February 21, 2013, the Town created a Certification for the position of police sergeant, upon which Ms. McNamara's name appeared.
6. On March 3, 2013, Ms. McNamara was promoted to Sergeant.
7. On September 8, 2013, now-Sgt. McNamara applied to take the lieutenant's promotional examination.
8. On October 17, 2013, HRD informed Ms. McNamara that she was not eligible to sit for the October 19, 2013 lieutenant's promotional examination.
9. On October 19, 2013, Sgt. McNamara took the lieutenant's promotional examination.
10. HRD did not score Sgt. McNamara's promotional examination given its previous determination that she was not eligible to sit for it.

Summary Decision Standard

Section 1.01(7)(h) of the applicable standard adjudication Rules of Practice and Procedure at 801 CMR provides that, "When a Party is of the opinion there is no genuine issue of fact relating to all or part of a claim or defense and he is entitled to prevail as a matter of law, the Party may move, with or without supporting affidavits, for summary decision on the claim or defense. If the motion is granted as to part of a claim or defense that is not dispositive of the case, further proceedings shall be held on the remaining issues". 801 CMR 1.01(7)(h). The notion underlying the summary decision process in administrative proceedings parallels the civil practice under Mass.R.Civ.P.56, namely, when no genuine issues of material fact exist, the agency is not required to conduct a meaningless hearing. *See* Catlin v. Board of Registration of Architects, 414 Mass. 1, 7 (1992); Massachusetts Outdoor Advertising Counsel v. Outdoor Advertising Board, 9 Mass.App.Ct. 775, 782-83 (1980).

Arguments of the Parties in the Instant Appeal

Sgt. McNamara argues that a candidate is first "certified" for the next lower title when his / her name first appears on an "eligible list" as opposed to when his / her name first appears on a "Certification". If that interpretation were applied here, Sgt. McNamara would have been first certified for the lower title of police sergeant on March 31, 2012, the date that HRD created the eligible list. Applying the March 31, 2012 date, Sgt. McNamara would be eligible to sit for the lieutenant's promotional examinations since, as of October 19, 2013, she was in the next lower title of sergeant and had been employed in the (Stoughton Police) force for at least one year after certification in the lower title of sergeant.

HRD argues that its actions were consistent with Section 59, the Courts' decisions in Weinburgh and the post-Weinburgh Commission decisions regarding this matter. Specifically, HRD argues that Ms. McNamara's name did not appear on a Certification for sergeant until February 21, 2013. Thus, as of the October 19, 2013 lieutenant's examination, Ms. McNamara, although serving in the next lower title, had not been employed in the force for at least one year after certification in the lower title of sergeant.

Analysis

Sgt. McNamara is effectively asking the Commission to reconsider its "post-Weinburgh" decisions regarding this matter. I carefully considered each of her arguments and have concluded that they do not support such a reversal for the reasons listed below.

First, Sgt. McNamara argues that the Commission misread the Court's decisions in Weinburgh, by mistakenly believing that the Court's reference to a "promotional list" was meant to refer to an "eligible list" and not a "Certification." The record shows the opposite. As referenced above, the Superior Court, as part of its decision in Weinburgh, explicitly referenced the "Certification", its definition under the civil service law and that it was drawn *from* an eligible list, clearing distinguishing the two, stating:

> "Moreover, the statute uses the term 'certification' rather than language closer to the Commission's interpretation, such as 'promotion' or 'having served". This is of particular significance as 'Certification' is a term of art with respect to Chapter 31. G.L. c. 31, § 1 states: "Certification is the designation to an appointing authority by the administrator of sufficient names *from an eligible list* or register *for consideration of the applicants' qualifications* for appointment pursuant to the personnel administration rules." Reviewing the plain language of the whole statute, I read Section 59 to only require that candidate have been placed on the *promotion list* for the immediate lower position a year prior, not that he have been actually promoted to it. As the Administrative Record establishes, Weinburgh was on the promotion list for Fire [] Lieutenant in the Summer of 2003, more than fifteen months prior to the date of the Captain's exam … (emphasis added) (*emphasis in original*)"

Further, the Commission, in its post-Weinburgh decisions, including Dickinson and Hallissey, thoroughly examined the specific facts pertaining to Mr. Weinburgh to confirm that the Court was indeed referring to the date Mr. Weinburgh's name first appeared on a *Certification,* stating in relevant part:

> I asked HRD to produce information regarding when Mr. Weinburgh's name appeared on Certifications for the lower qualifying title. According to HRD records, Mr. Weinburgh's name first appeared on Certification No. 230772 on August 28, 2003 for the position of Haverhill Fire Lieutenant. He was not appointed from this Certification. His name then appeared on a second Certification (No. 230912), that was created on October 16, 2003. He was also not appointed from this Certification. Finally, his name appeared on a third Certification (No. 231131) that was created on December 12, 2003. This is the Certification from which Mr. Weinburgh was actually promoted to the position of lieutenant. The captain's promotional examination was administered on November 20, 2004. In its decision, the Court stated in relevant part that: "In the summer of 2003 … Weinburgh was certified for the position of fire lieutenant and placed on the fire lieutenant promotion list. After officially being appointed to this position on December 21, 2003, [Weinburgh] filed a bypass appeal with the [Commission]." The Court ultimately concluded that since Mr. Weinburgh's name was certified in the "summer of 2003", he was eligible to sit for the promotional examination that was held more than one year later, on November 20, 2004. Although the record before the Court did not clearly delineate that Mr. Weinburgh was not actually promoted from the August 28, 2003 certification, I reasonably infer that it would not have altered their conclusion, given their reasoning that "certification" was a mere "administrative landmark." Mr. Weinburgh took and passed a civil service examination for the lower qualifying title of lieutenant and his name was "certified" for this qualifying title on August 28, 2003. Although he was not promoted from this Certification, this is the Certification that the Appeals court relied on in deciding that he met the statutory 1-year requirement."

As stated above, the Court not only referenced the actual definition of a Certification, but then identified the actual Certification (Summer 2003) upon which Mr. Weinburgh's name first appeared, clearly distinguishable from the date that his name first appeared on an eligible list, which was May 13, 2012. Sgt. McNamara's argument here is that the Court: a) didn't actually mean to refer to a "Certification" (which it did); and b) that it didn't understand that Mr. Weinburgh's name first appeared on an eligible list fifteen (15) months earlier.

Second, regardless of the Court's decisions in Weinburgh, Sgt. McNamara argues that the words "after certification" were always meant to refer to when a candidate's name first appeared on an eligible list, as opposed to a Certification. This would effectively re-write the civil service law and potentially upend the entire appointment and promotion process which depends on highly consequential distinctions between "eligible list" and "certification".

G.L. c. 31, § 1 defines "Eligible List" as:

> "a list established by the administrator, pursuant to the civil service law and rules, of persons who have passed an examination; or a re-employment list established pursuant to section forty; or a list of intermittent or reserve fire or police officers as authorized under the provisions of section sixty; or any other list established pursuant to the civil service rules from which certifications are made to appointing authorities to fill positions in the official service."

There is nothing in this definition that states or suggests that the establishment of an eligible list is equivalent to "certification". In fact, the definition actually distinguishes the two processes by stating " … *from which certifications are made* to appointing authorities to fill positions in the official service."

The distinction between the two processes is further stated in the definition of "Certification".

G.L. c. 31, § 1 defines "Certification" as:

> "the designation to an appointing authority by the administrator of sufficient names from an eligible list or register for consideration of the applicants' qualifications for appointment pursuant to the personnel administration rules."

Third, Sgt. McNamara argues that prior references by HRD and the Commission to a "certified eligible list" show that it was the intent of both entities that an individual meets the "after certification" requirement in Section 59 upon being placed on an eligible list. Respectfully, had that been the case, this appeal would not be necessary. Notwithstanding the

Appellant's word-search to find instances where the Commission referenced a "certified eligible list", there is not one decision that can be cited in which HRD or the Commission has ever concluded that the "after certification" requirement in Section 59 is met upon an individual's name being placed on an eligible list.

Fourth, Sgt. McNamara argues that HRD's decision in 2009 to delegate various administrative functions to appointing authorities, including the creation of promotional certifications, is prone to abuse. Thus, the date upon which a person's name appears on a Certification should not be the start date for the purposes of determining eligibility to sit for a promotional examination. This issue was fully vetted in the Commission's post-Weinburgh decisions and, while it may be an argument against delegation, it does not permit any party to re-write a statute that was enacted many years prior.

Fifth, without the submission of any supporting affidavits, Sgt. McNamara cites the case of another sergeant who was deemed eligible to sit for the lieutenant's examination, despite being ranked below her on the eligible list for sergeant, as evidence of the illogical result of the Commission and HRD's interpretation of Section 59. Accepting the limited information provided by the Appellant as true, there is nothing illogical at all about that outcome. Based on the information provided by the Appellant, it is clear that the sergeant referenced in her brief took and passed at least one prior examination for sergeant and that his name appeared on a prior certification.

In summary, Section 59 states in relevant part that:

> "no such examination shall be open to any person who has not been employed in such force for at least one year after certification in the lower title or titles to which the examination is open."

Section 59 does not state, nor was it intended to state, that a person is eligible to take a promotional examination one year after the person's name appeared on an eligible list. That is clear from the plain meaning of the statute and the recent Court decisions regarding this matter.

Conclusion

For all of the above reasons, HRD's Motion for Summary Decision is allowed and Sgt. McNamara's appeal under Docket No. B2-13-289 is hereby *dismissed*.

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Civil Service Commission

_____
Christopher C. Bowman
Chairman

By a vote of the Civil Service Commission (Bowman, Chairman; Ittleman, McDowell, and Stein, Commissioners) on June 26, 2014.

A true record. Attest:

_____
Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of this Commission order or decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(l), the motion must identify a clerical or mechanical error in this order or decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration does not toll the statutorily prescribed thirty-day time limit for seeking judicial review of this Commission order or decision.

Under the provisions of G.L c. 31, § 44, any party aggrieved by this Commission order or decision may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of this order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of this Commission order or decision.

Notice:
Brian Simoneau, Esq. (for Appellant)
Melinda Willis, Esq. (For HRD)